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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 98

SARAH PRINCE, *Appellant*

v.

COMMONWEALTH OF MASSACHUSETTS

APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS
FOR THE COUNTY OF PLYMOUTH

APPELLANT'S BRIEF

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Opinion Below

The opinion of the Supreme Judicial Court of Massachusetts is reported in 313 Mass., 46 N. E. 2d 755. It appears in the record. (37-44)

Jurisdiction

On February 15, 1943 the Massachusetts Supreme Judicial Court overruled appellant's exceptions. On May 14, 1943 appellant duly applied for appeal to this court. The application was timely granted pursuant to Section 237 (a) of the Judicial Code [28 U S C 344 (a)].*

* See also Act of Congress of January 31, 1928 Chapter 14, 45 Stat. 54, and the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, supporting jurisdiction of the court.

Questions Presented

The *fundamental* question to be answered by this Court is: Can the state, under the guise of its police power, prohibit public worship of Almighty God by a child under eighteen years of age and according to the dictates of its conscience, without violation of the First and Fourteenth Amendments to the United States Constitution, where the child's act of worship does not violate the law of morals, invade the property rights of others, constitute a breach of the public peace, harm the welfare of the child or produce any injury aimed at by the statute?

The *incidental* questions involved are:

(1) Did the courts below err in refusing to sustain appellant's motion to dismiss, motion for a directed finding and request for rulings in which it was urged that the statute as construed and applied abridges and denies appellant the right to educate, teach and direct the spiritual welfare of the child, to maintain a family and to discharge her moral obligations as personal guardian of said child, contrary to the First and Fourteenth Amendments to the United States Constitution?

(2) Did the courts below err in refusing to sustain appellant's motion to dismiss, motion for a directed finding and request for rulings in which it was urged that the statute as construed and applied abridges and denies appellant's and the child's freedoms to worship Almighty God and freedom of conscience contrary to the First and Fourteenth Amendents to the United States Constitution?

(3) Did the courts below err in refusing to sustain appellant's motion to dismiss, motion for a directed finding and request for rulings in which it was urged that the statute as construed and applied is unconstitutional because it abridges and denies appellant's and the child's privileges, rights and immunities secured by the Constitution in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States?

Massachusetts Legislation Questioned

The validity of Sections 69, 80 and 81 of Chapter 149 of the General Laws of Massachusetts (Ter. Ed.), as amended by the Statutes of 1939, Chapter 461, Section 7, are drawn in question here. Among other things the sections provide:

> "No boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise of any description, or exercise the trade of bootblack or scavenger, or any other trade, in any street or public place" [Section 69, as amended] [1]
>
> "Whoever furnishes or sells to any minor any aritcle of any description with the knowledge that the minor intends to sell such article in violation of any provision of sections sixty-nine to seventy-three, inclusive, or after having received written notice to this effect from any officer charged with the enforcement thereof, or knowingly procures or encourages any minor to violate any provisions of said sections, shall be punished by a fine of not less than ten nor more than two hundred dollars or by imprisonment for not more than two months, or both." [Section 80]
>
> "Any parent, guardian or custodian having a minor under his control who compels or permits such minor to work in violation of any provision of sections sixty to seventy-four, inclusive, or knowingly certifies to any materially false statement for the purpose of obtaining the illegal employment of such minor, shall for a first offence be punished by a fine

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[1] Section 77 provides that ss. 69 to 73 shall be enforced by supervisors of attendance and police officers and vests the former with "full police powers for the purpose." Section 79 provides in part that any person "who refuses to give" to a "supervisor of attendance" and police officers "such information as may be required for the proper enforcement" of the act shall be guilty of an offense. Section 79 was declared to be unconstitutional by the Supreme Judicial Court. R. pp. 43-44.

of not less than two nor more than ten dollars or by imprisonment for not more than five days, or both; and for a subsequent offense by a fine of not less than five nor more than twenty-five dollars or by imprisonment for not more than ten days, or both." [Section 81] [2]

Construction Placed on the Statute by Court Below

The Supreme Judicial Court held that the statute was not confined in its application to "street trades of well known types commonly carried on by children for money" but that its terms also extended to prohibit activity "without profit" for the purpose of "spreading of their beliefs in this way as a command of God and hence as a religious and moral duty. . . . But if he accepted it in full, we still think a finding was warranted that the law had been violated." (R. 39, 40) "There is nothing in that section that restricts its scope to selling with an ultimate net profit in view." R. 40.

The court below also construed Section 81 of the statute so as not to require employment of a child to sustain a conviction. The court said: "The 'work' mentioned in s. 81, in so far as that section refers to s. 69, is the selling, exposing or offering for sale prohibited by s. 69, whether or not that is carried on under a technical employment or for a wage." R. 40-41.

History and Facts Showing Questions Presented

HISTORY

Appellant was charged by complaints filed in the District Court of Brockton with a violation of Sections 79, 80 and 81 of the Chapter in question. R. 1-2, 24-25. [3]

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[2] These statutes are part of the *Child Labor Law* enacted in 1939 by the General Court and entitled "An Act to Regulate the Labor of Minors."

[3] Section 79 was declared unconstitutional. The complaint drawn thereunder is immaterial here and will not be referred to hereafter.

The complaint charging a violation of Section 80 alleged, *inter alia,*

> "did furnish to one Betty M. Simmons, a girl under the age of eighteen years, certain articles, to wit: magazines, she, the said Sarah Prince well knowing that the said Betty M. Simmons was to sell the said magazines unlawfully". [R. 1, 24]

The complaint charging a violation of Section 81 alleged, *inter alia,*

> "was the custodian of Betty M. Simmons, a minor, and did permit the said Betty M. Simmons to work contrary to law." [R. 1, 25]

In the District Court of Brockton appellant was tried, found guilty as charged and sentenced. She duly appealed to the Superior Court for Plymouth County. Upon her appeal she had a trial *de novo.* She pleaded not guilty to each complaint. A jury was waived. Evidence was received by the court. Appellant was again found guilty as charged. (R. 35) She was fined $10 under each complaint. R. 35.

FACTS

Sarah Prince is one of Jehovah's witnesses and an ordained minister. (R. 12, 18) She preaches the gospel of God's kingdom as the only hope for mankind. (R. 19) She has two young boys, Donald and William. (R. 16, 17) Also living with her is her niece, Betty M. Simmons. She has legal custody of the child. (R. 14) The children also are Jehovah's witnesses. R. 14, 16, 17.

As one of Jehovah's witnesses appellant appeared regularly each week on the streets of the business section of Brockton, Massachusetts to preach the gospel of God's Kingdom by public distribution of the *Watchtower* and

Consolation magazines. (R. 19) On the evening of December 18, 1941 at her home she prepared to engage in the public street distribution of the magazines. Altough she permitted the children to engage in the preaching activity on the streets during the daytime she ordinarily did not take them with her at nighttime. That particular evening the children asked permission to go with her. She said "No." They cried to go. Betty M. Simmons asked for a magazine bag and the magazines and Sarah Prince gave them to her. She took the children with her and permitted them to engage in the preaching work with her upon the sidewalks in downtown Brockton. R. 14, 17, 18.

Appellant and Betty Simmons took their positions near the corner curb of Legion Parkway and Main Street in Brockton. (R. 14, 18) Betty was standing on the same sidewalk about twenty feet from Sarah Prince. R. 15.

Betty was holding up in her hand so that passing pedestrians could see, copies of the *Watchtower* and *Consolation* magazines, which were in a cellophane protective cover. Suspended from her shoulder was a canvas magazine bag. On the bag in bold type was printed "Watchtower and Consolation 5c per copy" (R. 15, 21) Betty Simmons said that she was doing this work because she loved "the Lord and He commands us to" do it. She declared that it was her way of worshiping Almighty God. She said she was not "selling" the magazines but was taking contributions of five cents per copy for both magazines, and that if the people contributed more she would receive it. This particular evening she did not receive any contributions and did not distribute any magazines. Neither did the appellant. (R. 14, 18) On other occasions, while engaged in the same work, she had received contributions and had given away free of charge copies of the magazines. (R. 14) That when contributions were received she turned them over to her aunt, the appellant. (R. 14) All contributions turned over to appellant and received by appellant were delivered to Roger Flint the company servant for

Jehovah's witnesses in Brockton. (R. 18-19) Appellant would receive more magazines for distribution. If she had no money or received no contributions she could obtain the magazines anyway. R. 19.

While appellant and the children were thus working upon the sidewalks they were approached by George S. Perkins, the Supervisor of Attendance of the Public Schools of Brockton. He had a discussion with Sarah Prince about Betty Simmons. Appellant and the child refused to disclose Betty's name to him upon his demand. Mrs. Prince told him that Betty attended the Shaw School in Brockton. (R. 14, 16) Perkins reminded Mrs. Prince that he had warned her about a year previous concerning her permitting her two sons, Donald and William, to engage in the "selling" of "the magazines". He also told her that on a prior occasion he had discussed the law with her and even let her read the law. (R. 16, 17) He also said he had written a letter to her explaining the law. (R. 17, 20-21) Mrs. Prince told him that the children had cried and she brought them with her. (R. 14, 18) He did not obtain, buy or make a contribution for a magazine. He did not see appellant or the girl sell any magazine. He did not know what was done with the contributions received by them for the magazines. (R. 17) Sarah Prince admitted to him that she furnished the magazines to the girl and said to him, "And neither you nor anybody else can stop me". (R. 15) She told him that "this child is exercising her God-given right and her constitutional right to preach the gospel, and no creature has a right to interfere with God's commands." R. 20.

This conversation between Mrs. Prince and Mr. Perkins took place about twenty minutes before nine o'clock that evening. (R. 19, 20) Perkins said he would give her five minutes to get off the street. She said five minutes was all she needed. She pointed out that other children were with their parents walking along the sidewalk at the time shopping. Then she queried: "So, why bother me." (R. 20)

She and the children stopped their preaching activity at 8:45 p. m. As they were leaving they met Roger Flint, the company servant. At that point Perkins returned and broke into the conversation. He attempted to argue with Mrs. Prince. She said: "I'm not going through this any more. We've been through it time and time again. I'm going home and put the little girl to bed." She left Mr. Perkins and Mr. Flint speaking together about the matter. R. 20.

Appellant said that she had been preaching as an ordained minister for about five years. There was received in evidence a certificate issued by the Watchtower Bible and Tract Society stating, *inter alia*, that she was ordained and "fully consecrated to do the will of Almighty God and obey his commandments laid down in the Bible". She relied upon the same authority for her ordination as did Christ Jesus which is Isaiah 61:1, 2, where it is written: "The spirit of Jehovah God is upon me because Jehovah has anointed me to preach good tidings unto the meek; he hath sent me to bind up the broken hearted, to proclaim liberty to the captives and the opening of the prisons to them that are bound; to proclaim the acceptable year of our Lord, the day of vengeance of our God, and to comfort all that mourn." It is shown that the name *Jehovah's witnesses* is a proper name for all true Christians; for Isaiah 43:10-12 states: "Ye are my witnesses, saith Jehovah, that I am God; . . . I have declared and saved and showed when there was no strange god among you, therefore ye are my witnesses, saith Jehovah, that I am God." R. 18.

Sarah Prince testified that Jehovah God was using the society and His witnesses to divide the people, 'sheep from goats', to warn the people of good will and show them the way of safety and refuge under His kingdom. (R. 19) She further said that Jehovah "has commanded the people to come out of the religions, Catholic, Protestant, Jew or Gentile. That is the first thing that is going down, and all who are in with religion will perish with religion. It is on its

last skids now. That is why we are on the street corners. Christianity will survive, not religion. The destruction of the wicked at that time will be tremendous, far exceeding anything in human history. The nations of Christendom are forgetters of God. His name has been blasphemed and reproached down through the ages. But He says, 'They shall know that I am Jehovah'. For no other reason was I on the street corner, and my children, but to tell the people of the one place of safety, that is in the kingdom of God under Christ that we have prayed for." R. 19, 21.

Roger M. Flint testified that he gave the literature to Mrs. Prince in return for the contribution received, which was a small amount to help cover cost of printing other like literature. The money received was sent by him to the Society to print additional literature. It was shown that Flint received no profit from these receipts. He said: "It is a Christian work, a charitable work. Jehovah's witnesses lose much money getting this message to people of good will. God has commanded us to go to the people. At Matthew 24: 14 it is written, 'And this gospel of the kingdom shall be preached in all the world for a witness unto all nations; and then shall the end come.' It is our privilege in obedience to the Lord's commandments to faithfully obey him without any profit whatsoever." R. 21.

How Federal Questions Raised

At the start of the trial appellant filed and urged a motion to dismiss the complaints. (R. 3, 29, 35) This was overruled and exception allowed. (R. 5, 31, 35) At the conclusion of the Commonwealth's evidence appellant renewed her motion to dismiss the complaints and presented a motion for direct finding. (R. 5, 5-6) The court declined to rule on this motion. (R. 6) At the conclusion of all evidence, appellant renewed her motions to dismiss and for a direct finding. They were overruled and exception allowed. (R. 7, 35) At the close of the evidence appellant

presented her requests for rulings. (R. 7-8) They were all denied with exceptions to the appellant. R. 9, 10.

Under grounds two through six inclusive of the motion to dismiss and motion for directed finding, and also under the thirteenth request for ruling, appellant attacked the statutes on the grounds that as construed and applied they abridged the right of the child and appellant to worship Almighty God according to the dictates of their consciences as directed by Jehovah, their rights to freedom of speech and press, and that the statutes placed the child in an unreasonable and arbitrary classification, all contrary to the First and Fourteenth Amendments to the United States Constitution. R. 3-4, 29-30; 5-6, 31-32; 8-9, 34-35.

The Supreme Judicial Court considered each ground urged upon the exceptions taken to the rulings of the Superior Court and overruled the appellant's contentions. (R. 39, 44) The court below held that as construed and applied the statutes did not abridge the rights of the child or appellant contrary to the federal Constitution. (R. 41-42) Thereby the validity of the statute was sustained as applied to appellant in every respect by the Supreme Judicial Court of Massachusetts. R. 41-42.

Specification of Errors to be Urged

Appellant intends to urge that the Supreme Judicial Court erred in failing to hold that the Superior Court committed reversible error in overruling

1) Appellant's Motions to Dismiss and/or Quash the complaints filed in these cases.

2) Appellant's Motions to Dismiss and/or Quash the complaint filed in these cases at the close of all the evidence.

3) Appellant's Motion for Directed Findings filed in these cases at the close of all the evidence.

4) Appellant's thirteenth request for ruling wherein appellant asked the court to find the statutes unconstitutional for the reasons stated above.

PRELIMINARY REMARKS

The statutes in question are a part of the social legislation planned and enacted in the various states of the Union to prevent the exploitation of children in the ordinary trades, jobs and enterprises of commerce, including properly the newspaper industry. The purpose of the legislation is to protect children from economic exploitation and keep them from the evils of such enterprises that contribute to the degradation of children. The statutes are restrictive measures. They were not designed to invade the realm of education and raising of children by parents or interfere with such efforts. The law is closely related to legislation which prohibits conduct contributing to the delinquency of children and truancy.

Juvenile delinquency and child labor are old problems with which mankind and governments have had to contend for centuries. Progress and enlightenment during the last century has enabled the benevolent persons and organizations to accomplish much in the field of child welfare. Every enlightened nation, state and community has not hesitated to enact legislation to restrict abuses of children, and prohibit exploitation. Only the mean and derelict person has opposed or attempted to circumvent such legislation.

Those who have espoused such worthy movements are alarmed at the ineffectiveness of such measures to stem the rising tide of juvenile delinquencies and child labor during this total war. This malady is directly attributable to breaking up of homes and family ties by total war. The increased participation by children in jobs and earning high wages has liberated many from family ties and parental restraint which have exposed many to drinking, gambling, undesirable places of entertainment and widespread immorality. These conditions are the evils which the delinquency and child labor laws are designed to curtail. They are here mentioned to emphasize the importance of protecting the family tie, which has been impaired here.

The facts in this case are not of the type that are found in the flood of child labor and delinquency cases that inundate the defense plant areas of the nation. The activity of the child and appellant was entirely foreign to any such evils. Their work was laudable, lofty, upright and to the benefit of mankind. There was no showing in the courts below that the work contributed to the injury of the child or the community. The activity did not cause the child to be truant, neglect her studies at school, impair her health or morals or interfere with her school life. There is nothing in the record to indicate that any of the evils the statute was designed to prevent existed in this case. The record *refutes* any such contention. Neither is it contended that there was a commercial exploitation of the child. Admittedly there was no employment of the child to engage in work or child labor as those terms are ordinarily understood and defined.

In a democracy the children are not considered as the wards of the state. (*Pierce* v. *Society of Sisters*, 268 U. S. 510) It is a totalitarian precept that children are the exclusive property of the state and that parents are only animal agencies to bring the children into existence for the benefit of the state. "The success of democratic institutions is measured, not by extent of territory, financial power, machines, or armaments, but by the desires, the hopes, and the deep-lying satisfactions of the individual men, women, and children who make up its citizenship." [4] "While the individual is becoming less significant as a unit in our elaborate system of production and distribution, his worth and integrity remain the cornerstone of our democratic philosophy. . . . In educating our children we desire, therefore, to give them freedom to express their natural interests, to enjoy life, and to gain that self-reliance which

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[4] President Roosevelt to the White House Conference on Children in a Democracy, April 26, 1939. *Children In A Democracy*, Government Printing Office.

is hardly less important today than it was to the early American pioneer." [5]

Subject to right of the state to intervene in the case of an abuse of privilege, the parent's right of control over the children has been recognized as supreme under the common law, the Roman law and the law of Almighty God. Under the common law this right was held to be despotic until the child reached a certain age. The power has been relaxed considerably to meet the change of the times, but even today the law recognizes that the power of the parent or personal guardian or custodian during minority has not been abrogated. During minority the parent has control over the person and property of the children except such property as is held in trust. Universally the father may restrain the liberty of children and even administer corporal punishment and the state cannot intervene or interfere by statute or otherwise unless such chastisement is excessive or cruel. Until quite recently the father had the power to bind out his sons as apprentices and, though this right has been generally discontinued by custom, the father is still entitled under the law to the earnings of his minor child so long as the child remains at home and has not been emancipated. The issuance of licenses to marry in cases of minors is generally forbidden unless parental consent has been given and marriages without such consent are voidable at the instance of the parent and as to certain legally defined ages some marriages are absolute nullities. With this power to the parent or guardian goes the obligation, enforceable by law, to support, maintain, educate and provide for the needs of minor children. However, the right of the parent is not absolute and is subject to some restraints. The parent or guardian does not have a property right in the child.

The Court is well aware of these legal obligations and relationships but they are mentioned for the purpose of

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[5] Op. cit. p. 2, 3.

showing that the state does not have absolute control and that the parent does not derive his authority over the children by virtue of any grant or allowance from the State, but that such powers of control over children have been recognized as fundamental personal rights of each citizen. These rights are inherent and are secured by the federal Constitution against abridgment by the state.

It is especially true that in the field of religious beliefs and practices the education of the child by the parent in the Bible is the highest attainment of the democratic institution, and the state is shorn of all power and authority to regulate, intervene or interfere with it. The state cannot prohibit the worship, service or Christian practices of the child as directed by the parent so long as such do not involve a violation of the law of morals or break out into overt acts against the peace and safety of the State and nation. It must be conceded that there is no abuse of parental authority here. There is no contention that appellant has abused her rights as custodian of the child to such a degree that the law has severed the relationship between her and the child, so as to make it a ward of the state. The state does not contend that appellant placed the child upon the streets to beg for selfish gain of appellant. It is not contended that appellant was neglectful of her parental duties and did not properly provide for Betty Simmons, or abandoned her.

Only lately has this Court announced the strict limitation on the powers of government to interfere with matters of this sort:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.... If there are any circumstances which permit an exception, they do not now occur to us."—*West Virginia State Board of Education* v. *Barnette*, 319 U. S. , 63 S. Ct. 1178.

Paradoxically the result of the prosecutions here is to

accomplish directly an evil which the statute was designed to prohibit, to wit, break up the family relationship between appellant and the child and prevent their continuing to worship God according to dictates of their consciences. Though it was contended in the courts below that this statute was never intended by the law makers to accomplish this result, the Supreme Judicial Court of Massachusetts has declared that the General Court did so intend. The problem of this court then is to determine whether such construction and application of the statute brings it into collision with the federal Constitution.

Points for Argument

ONE

As construed and applied the statute is unconstitutional because it abridges and denies appellant's right to educate, teach and direct the spiritual welfare of the child, to maintain a family and to discharge her moral obligations as personal guardian of said child and the child is denied the right to the benefits of such relationship, all contrary to the First and Fourteenth Amendments to the United States Constitution.

TWO

As construed and applied the statute is unconstitutional because it abridges and denies appellant's and the child's freedom to worship Almighty God according to the commands of Jehovah and their freedom of conscience contrary to the First and Fourteenth Amendments to the United States Constitution.

THREE

As construed and applied the statute is unconstitutional because it abridges and denies appellant's and the child's privileges, rights and immunities secured by the Constitution in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

ONE

As construed and applied the statute is unconstitutional because it abridges and denies appellant's right to educate, teach and direct the spiritual welfare of the child, to maintain a family and to discharge her moral obligations as personal guardian of said child and the child is denied the right to the benefits of such relationship, all contrary to the First and Fourteenth Amendments to the United States Constitution.

The prosecution of appellant through misapplication of the statute is a step toward destroying one of the oldest and fundamental institutions of society, namely, the family. The family is the backbone of all orderly governments. It is to democracy what blood is to the human body. Drain away the warm family relationship and substitute the cold foster-parental care of the government and democracy will perish as surely as will the body when the blood ceases to circulate. If the individual in a democracy is to retain his integrity the family relations must not be impaired by misapplied laws. The strength of the nation depends upon the security of the family and family life. "No more important task faces the American community today than that of maintaining its homes. The health and happiness of children, the guidance of youth, the security of families

must be guarded from impairment in wartime so that the well-being of this nation is assured." [5]

It must beconceded that in a democracy the family is the primary force and the socializing agency through which the child acquires most of moral, social and cultural values. The family and home are institutions in their own right. They do not depend upon government for their creation. Long before organized government was established these institutions prevailed to secure the perpetuation of humanity. They are fundamental, and are as much a part of personal rights guaranteed by the Constitution as the *Bill of Rights* is a part of the Constitution.

In *Meyer* v. *Nebraska,* 262 U. S. 390, this court declared that the liberties secured by the federal compact were not merely freedoms from bodily restraint; but that there was secured the right to engage in the common occupations of life, to marry, establish a home and bring up children. It was said that the citizen is protected in the enjoyment of those privileges long recognized at common law as essential to the orderly pursuit of happiness by freemen. *Berea College* v. *Kentucky,* 211 U. S. 45, 47; *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589. Marriage and childbearing is God's arrangement for all humankind that shall live on the earth. It is beyond the power of the state to interfere with or abridge the right of all persons within its boundary to procreate. Even this right cannot be denied to criminals. *Skinner* v. *Oklahoma,* 316 U. S. 535. By stronger force of reason the state cannot interfere with and abridge the parents' right to bring up children in a way acceptable to their own judgment so long as it is not inimical to the welfare of the children or the well-defined interest of the state.

The home, family, parents and guardians are the centers of security, hope and love of every child. The safety and protection of the home and family are the centers of what

[5] Franklin D. Roosevelt, March 29, 1943 in letter to Dr. Harry C. Munro, Secretary of The Committee on National Family Week.

the fighting men of democracies at the battle fronts fight for. Those at home attempting to preserve the heritage contribute to the morale of the people and the war effort.

The giving of food, shelter and material security is not the only task of the family. Less conspicuous, but more important by far, is what the child acquires through the family in regard to his relations with other persons. From the parent or guardian the child learns to walk, talk, live and form conceptions of ethical and moral values. The parent in the home is the divinely appointed teacher of the child. The home is the first school attended by the child, the school of all schools and for which no substitute can be found. The family has the first responsibility for the care of children: the child holds first place and primary concern in every family.

It is plain that the self-sufficiency, self-respect, initiative, enterprise, self-reliance, proper respect for others and a cooperative attitude in children of a democracy cannot be attained by the misapplication of child labor laws against parents who are honesly endeavoring to set examples of right conduct for their children. On the contrary such virtues sought in children are destroyed by the branding of the parent as a criminal abuser of his rights; and this is especially true, when, as here, there is no evidence of abuse of the right by the guardian. The state, the civil authority, in a democracy has the duty to protect and conserve the parental authority over children and refrain from an overt acts or moves against the parent or guardian because of their efforts to provide constructive influence over the children.

The misconstruction and misapplication of the statute in question by the court below has pushed child labor legislation into a field where it has no authority to roam. Such legislation is confined to commercial exploitation of children for gain. The law, like delinquency laws affecting children's conduct, is limited to harmful abuses of the child. When these laws are expanded into the domain of parental control,

freedom of worship, parental discipline, family life and right practice they are immediately brought into collision with the constitutional shiled of protection of these fundamental rights. The 'rod of the state cannot rest on the lot of righeous teachings and practices' of the family and its members in a democracy.

Like any other constitutional right this right of bringing forth children, maintaining a family and directing the education of the little ones is not absolute. The State can intervene when and only when there is an abuse by the parent or guardian in the exercise of the right, duty and privilege of controlling the child. There must be a positive showing that the parent's manner of exercising control over the child is an abuse which so greatly jeopardizes the welfare of the child as to require intervention on the part of the State to sever the relation between the guardian and child and declare the child a ward of the state. It must be conceded that there is no such abuse of the parental control in this case as would justify an invasion on the part of the Commonwealth of Massachusetts.

If the doctrine contended for by Massachusetts be sustained then family relationships in that state will no longer be secure. The principle can be extended so as to allow children to be pulled away from their mother's breast by legislative fiat of the commonwealth and the child denied the nurture, comfort and admonition of parents and the warmth of fatherly and motherly instructions in all matters of human affairs and life on the grounds that the manner of bringing the children up did not conform to the orthodox, conventional and prevailing practices of the majority of parents in the commonwealth.

In the United States there can be no standardized, regimented and fixed ways of home life for children. The entire population which gives support to the governments, state and federal, is a heterogeneous mass. Theodore Roosevelt properly described the country as a 'polyglot boarding house'. The differences in the social, religious, political,

personal, educational life can be held together in one container; but, like oil and water, they are unmixable by legislative fiat or decree. The personal and private practices of one group find no interest or comparison with another. What is joy to one is sorrow to another. There can be no measuring rod for such vital matters. And the people have only one common denominator that supports the government under the Constitution, namely, the liberties guaranteed by the Bill of Rights.

A clear perception of the foregoing factors in the life of the people of these United States leads one to the inescapable conclusion that the police power of the state touching the family corpuscle of the democratic "body" is limited to *abuses* thereof which cause sickness of the body.

"The police [power] of a State, in a comprehensive sense, embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others."[6]

Chief Justice Shaw of the Supreme Judicial Court of Massachusetts said: "The power we allude to is rather the police power; the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same. *It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise.*"[7] [Italics added]

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[6] Cooley, *Constitutional Limitations*, 8th Ed., p. 1223.
[7] *Commonwealth* v. *Alger*, 7 Cush. 53, 84.

The police power is not supreme and is not unlimited. It is subject to the limitations imposed by the Federal Constitution upon every power of government. It will not be suffered to invade or impair the fundamental liberties of the citizen.[8]

The court below leaned heavily upon the doctrine of 'presumption of constitutionality of legislation' as a refuge from the constitutional assault against the illegal and unconstitutional mis-application of the statute in this case. The appellant here does not dispute the verity of this well established doctrine. However, it is asserted with emphasis, that when a statute enacted under the police power of the State either on its face or constructively abridges, prohibits, or infringes any of the freedoms guaranteed by the First Amendment to the Constitution, such ordinance is *presumptively invalid* and the burden falls on the authority asserting the police power to prove by a preponderance of the evidence that the statute is a valid exercise of the police power directed at some ABUSE of the constitutional rights which, unless prohibited or regulated, would constitute a *clear and present danger* to the health, safety or general security of the community as a whole. The showing of the *abuse* is a condition precedent to the exercise of the police power where such exercise of power has a tendency to limit, infringe, restrict or prohibit any of the constitutional freedoms. The police power does not even exist in such cases unless there is a clear showing of the *abuse*. This rule is well stated by Chief Justice Hughes in *De Jonge* v. *Oregon*, 299 U. S. 353 (1937): "The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. . . . Therein lies the security of the republic, the very foundation of constitutional government."

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[8] *Jacobson* v. *Massachusetts*, 197 U. S. 11; Cooley, *Constitutional Limitations*, 8th Ed., p. 1299.

This same rule was effectively applied by the United States Court of Appeals for the District of Columbia in *Busey* v. *District of Columbia,* decided November 8, 1943. In that case an occupational license tax was sought to be applied to the activity of Jehovah's witnesses. The controversy reached this Court last term after the precedent case of *Murdock* v. *Pennsylvania,* 319 U. S. 105, had been decided. This Court remanded the case to the Court of Appeals for further consideration. (319 U. S. —, 63 S. Ct. 1277) Upon reconsideration, Mr. Justice Edgerton, speaking for the court, held: "Freedoms of speech, press, and religion are entitled to a preferred constitutional position because they are 'of the very essence of a scheme of ordered liberty.' (*Palko* v. *Connecticut,* 302 U. S. 319, 325) They are essential not only to the persons or groups directly concerned but to the entire community. Our whole political and social system depends upon them. Any interference with them is not only an abuse but an obstacle to the correction of other abuses. (Civil liberties are at present relatively little threatened by governmental action, but in many communities the civil liberties of unpopular groups are greatly threatened by private terrorism. Legal recognition of these liberties tends to discourage this terrorism.) . . .

"We think we may now hold that when legislation appears on its face to affect the use of speech, press, or religion, and when its validity depends upon the existence of facts which are not proved, their existence should not be presumed; at least when their existence is hardly more probable than improbable, and particularly when proof concerning them is more readily available to the government than to the citizen. *The burden of proof in such a case should be upon those who deny that these freedoms are invaded.* . . . No presumption which lacks a probable basis in fact should be permitted to conceal an interference with essential freedoms." [Italics added]

The Commonwealth and the court below have wholly

failed to discharge the burden placed upon the appellee to show an abuse of the parental prerogative or clear and present danger of the evil resulting from the activity in question.

This court has repeatedly held that presumptions and legislative preferences respecting matters of public convenience supporting application of statutes to "other personal activities" do not justify application thereof to the exercise of the fundamental personal rights protected by the Bill of Rights. *Schneider* v. *State*, 308 U. S. 147, 161, 162; *Lovell* v. *Griffin*, 303 U. S. 444, 452. The police power of a state to abridge the fundamental personal rights is the exception rather than the rule. The findings of the legislative branch as to evils and dangers are not conclusive and binding upon the court. The judgment of the legislature is not unfettered. *Herndon* v. *Lowry*, 301 U. S. 242. The broad scope of presumption of constitutionality relied upon by the court below has been greatly narrowed by a showing that the facts to which the statute has been applied are shielded by the First Amendment, and that the conviction cannot be sustained without positive proof of abuse, injury or evil of serious proportions. *United States* v. *Carolene Prod. Co.*, 304 U. S. 144, 152; *Stromberg* v. *California*, 283 U. S. 359, 369-370.

An honest examination of the opinion of the court below will show that the tried and proved rules of law above mentioned have been discarded for an anomalous theory. If sustained, the effect of this decision would be that a high and almost impregnable wall would be built around all statutes turned out by the legislatures. Citizens prosecuted under these statutes would soon discover that the constitutional rights they have always regarded as being secure, above and beyond the power of legislative abrogation, would not be available to them until they were able to scale this wall of presumption by producing in court a preponderance of the evidence showing that these rights have been infringed by the statute. In a hard fought case this pre-

sumption in favor of the statute might well govern the conclusion of the case and the definition of the fundamental right. This is to put the most cherished possession of all Americans at a definite disadvantage. Henceforth citizens would be dragged into court with their freedoms held in their hand, so to speak, and if they were not strong enough to protect these freedoms from the grasp of the prosecution seeking to wrest them away, then liberty would die an untimely death right in the courtroom, which has heretofore been the arena for the protection of these rights. Weakened immeasurably by the presumption against the freedoms even before reaching the courtroom, these freedoms like so much sand would soon slide through the fingers of the much prosecuted citizenry, leaving the exalted police power supreme—as in Hitler's crumbling reich. If liberty is to be preserved and secured, then judicial presumptions must be in its favor and not, as here, in derogation of the cherished "four freedoms".

Until the commonwealth has discharged its duty, by proving a clear and present danger of substantial evils to the child from the activity which appellant permitted her to engage in, the conviction cannot be sustained. In holding that the clear and present danger test must be applied to police power abridgments of the liberties protected by the First Amendment this court in *Bridges* v. *California,* 314 U. S. 252, 262-263, 273, said:

> "Nevertheless, the 'clear and present danger' language of the *Schenck* case has afforded practical guidance in a great variety of cases in which the scope of constitutional proctections of freedom of expression was in issue. It has been utilized by either a majority or minority of this Court in passing upon the constitutionality of convictions under espionage acts, *Schenck* v. *United States,* supra; *Abrams* v. *United*

States, 250 U. S. 616; under a criminal syndicalism act, *Whitney* v. *California*, supra; under an 'anti-insurrection' act, *Herndon* v. *Lowry*, supra; and for breach of the peace at common law, *Cantwell* v. *Connecticut*, supra. And very recently we have also suggested that 'clear and present danger' is an appropriate guide in determining the constitutionality of restrictions upon expression where the substantive evil sought to be prevented by the restriction is destruction of life or property, or invasion of the right of privacy'. *Thornhill* v. *Alabama*, 310 U. S. 88, 105.

"Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial', Brandeis, J., concurring in *Whitney* v. *California*, supra, 274 U. S. at 374; it must be 'serious', id. 376. And even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *Schneider* v. *State*, 308 U. S. 147, 161.

"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak

equivocally. It prohibits any law 'abridging the freedom of speech or of the press'. It must be taken as a command of the broadest scope that explicit language, read into the context of a liberty-loving society, will allow. . . .

"In accordance with what we have said on the 'clear and present danger' cases, neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression. But even if they were appropriate measures, we should find exaggeration in the use of those phrases to describe the facts here."

It is not contended that Betty Simmons was engaged in any more hazardous activity while in the custody and control of appellant than were the many children who were at the time on the public sidewalks of Brockton accompanying their parents or guardians while shopping, window-shopping, going to and from the theatre, etc. The Commonwealth does not urge that the child was unattended or abandoned by appellant upon the public streets. Indeed it could not so contend because of the record. The state does not urge that the activity caused the child not to be sociable with other children. It is not said that the child was truant from school or neglectful of studies. There is no showing that the activity of the child caused her to be stolid, intolerant or unresourceful. The activity did not in any way impair the education, morals, welfare, physical or mental capacity of the child nor did it adversely affect any interest of the state. The act of worshiping Almighty God and preaching, benevolent as it is to mankind, must be said to be more conducive to the well-being of a child than staying at home, accompanying parents to do shopping or any other activity. It cannot be argued that any of the baneful results aimed at by the statute will follow.

TWO

As construed and applied the statute is unconstitutional because it abridges and denies appellant's and the child's freedom to worship Almighty God according to the commands of Jehovah and their freedom of conscience contrary to the First and Fourteenth Amendments to the United States Constitution.

Since marriage and family relationships were founded by Almighty God for the human race it cannot be ignored that the institution is sacred. Necessarily instruction in the Word of God to children in the home by the parent is vitally necessary. Christianity is the inspiring and stabilizing force in family life and is essential for family welfare among all people of good will. It affords a sense of responsibility to God which forms an indispensable spiritual foundation of the family life. It lifts the home and family into a higher realm than that of a biological unit of society. It contributes commandments, rules and practices which direct the individual to everlasting life at the hands of the Creator, Jehovah God. It must be conceded that freedom of worship according to the dictates of conscience must be allowed each parent or guardian and each child in order that Christianity may accomplish the stabilizing of family life of the nation. Without education in Christianity family life is insecure.

The primary responsibility for the Christian education of the child rests upon the parents or guardian. In the family the child is first introduced to his heritage of worship as he is introduced to his mother tongue. In the discharge of teaching the child the Bible and bringing him up in the nurture and the admonition of Jehovah God the

foundation is laid for the moral standards that are designed to guide his conduct through life.[9] No authority higher than Jehovah God can be found. His authoritative words on the subject are: "And these words, which I command thee this day, shall be in thine heart: And thou shalt teach them diligently unto thy children, and shalt talk of them when thou sittest in thine house, and when thou walkest by the way, and when thou liest down, and when thou risest up. And thou shalt bind them for a sign upon thine hand, and they shall be as frontlets between thine eyes. And thou shalt write them upon the posts of thy house, and on thy gates."—Deuteronomy 6: 6-9.

This command to teach must be carried out constantly throughout the life of the child. The *Supreme Law* says: "Only take heed to thyself, and keep thy soul diligently, lest thou forget the things which thine eyes have seen, and lest they depart from thy heart all the days of thy life; but teach them thy sons, and thy sons' sons." —Deuteronomy 4: 9.

Although born imperfect and subject to the condemnation of death because of the Adamic transgression of God's law, the child is without guile and if properly taught, subjected to the proper environment and brought up in the nurture of the Lord, will have a better chance of receiving life everlasting than if such a child is not thus educated by his parents but is left to drift about the "dead sea" of human doctrines for himself. It is the natural instinct and predilection of a child to follow its parent or guardian in the worship of Almighty God. It has been estimated that approximately one-half of the children and youth in the United States receive no religious instruction.[10] President Roosevelt has said, "We are concerned about

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[9] See pp. 29-31 of *Children in a Democracy*, supra. See, also, Final Report of The White House Conference on Children in a Democracy, section on Education Through Religious Training, pp. 181-192.

[10] Estimate for 1926 of the Department of Research of the International Council of Religious Education.

the children who are outside the reach of religious influences and are denied help in attaining faith in an ordered universe and in the Fatherhood of God."[11]

It must be conceded that parents of the Protestant, Jewish and Catholic faiths have the constitutional right, without control or interference by the state, to teach their children at home their respective faiths; and also, to take their children to the respective *forums of worship* and there direct their children in the participation in religious ceremonies and practices. Their liberty is not confined to belief and opinion but extends to *practice* of their belief *in* such *forums*. Some young children are, quite early in life, dedicated and trained for ultimate entry into the ministry and the order of the priesthood of the various sects of the religions. Witness the schools, parochial schools, seminaries, monasteries, etc., of the various sects of "recognized" religions. In the various orthodox religious forums there are to be found altar boys, choir singers and other young children having part in the clerical activity of the church. No person would have the effrontery to argue that in any of such instances the state could intervene and prosecute the parents or clerics connected with such children's religious activity.

By double force of reason the state is precluded from the forum of public worship employed by Jehovah's witnesses for preaching of the gospel. The state cannot enter such forum and apply criminal laws against parents or guardians of the children found in such forums practicing what they preach by publishing the message of God's kingdom as the only hope for those who will hear. This court has time and again declared that the public streets are a proper forum for the performance of the public preaching of the gospel by Jehovah's witnesses.[12]

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[11] See page 30, *Children in a Democracy*.

[12] *Cantwell* v. *Connecticut*, 310 U. S. 296; *Jamison* v. *Texas*, 318 U. S. 413; see also *Hague* v. *C. I. O.*, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147.

In those cases the court has held that the preaching activity of Jehovah's witnesses cannot be prohibited in such places. Here the court below has permitted an absolute prohibition of such preaching activity by all of Jehovah's witnesses who are females under the age of eighteen and all males under the age of twelve. This prohibition cannot be permitted to stand because it is contrary to the Constitution. *Jamison* v. *Texas*, 318 U. S. 413.[13]

It is plain that the process of education of a child in the commandments of God does not stop with the teaching of the Bible in the home. It is the further duty to bring such children to congregations where the Word of God is studied and the children be permitted to participate in discussions that they might enlighten their minds and renew their memory. The apostle Paul said: "Not forsaking the assembling of ourselves together, as the manner of some is; but exhorting one another: and so much the more, as ye see the day approaching." (Hebrews 10: 25) To Timothy he wrote, *inter alia*, "Study to shew thyself approved unto God, a workman that needeth not to be ashamed, rightly dividing the word of truth."—2 Timothy 2: 15.

The duty of one of Jehovah's witnesses, who is a parent or guardian, does not terminate with instruction. If the young witness of Jehovah indicates a willingness to do the will of God and prove before all men that he is one of Jehovah's witnesses also by going forth and publicly preaching upon the streets or from house to house in the same manner as does his parent or guardian, the parent is under the obligation to aid the child in taking the necessary step. By doing the overt act of preaching the gospel to others the child shows he is a witness for Jehovah God. A parent thus obligated as one of Jehovah's witnesses would be provoking the child unto wrath by permitting the child to refrain from performing covenant obligations.

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[13] See also *Thornhill* v. *Alabama*, 310 U. S. 88; *Carlson* v. *California*, 310 U. S. 106.

"And, ye fathers, provoke not your children to wrath; but bring them up in the nurture and admonition of the Lord." (Ephesians 6:4) "Children, obey your parents in the Lord; for this is right. Honour thy father and mother, which is the first commandment with promise, that it may be well with thee, and thou mayest live long on the earth." —Ephesians 6:1-3.

To permit the child to have a knowledge of God's law and to refrain from obeying His commandments by practicing right through preaching is wrong. "For as the body without the spirit is dead, so faith without works is dead also." (James 2:26) "Let your light so shine before men, that they may see your good works, and glorify your Father which is in heaven." (Matthew 5:15, 16) Whether young or old, one who claims to be a witness for Jehovah God must practice what he preaches. This the appellant and the child have done. By their conduct the child has said: "I delight to do thy will, O my God." (Psalm 40:8) "My tongue shall speak of thy word; for all thy commandments are righteousness."—Psalm 119:172.

It cannot be said that the chiild is too young to be permitted thus to worship and serve Jehovah God. The state has no authority to tell a child at what age it can begin practicing the requirements of Almighty God taught it by the parent. Thus to allow the state to intervene would forever destroy the inalienable American heritage of raising children and maintaining a home. In answer to the contention that he could not speak, a youthful prophet of Jehovah explained why he could not fail to speak. "But his word was in mine heart as a burning fire shut up in my bones, and I was weary with forbearing, and I could not stay." (Jeremiah 20:9) The God-inspired passions of a child cannot be muzzled or curtailed.

From scriptural perspective of the matter it is plain that there is no age limitation upon worship or preaching the gospel. When commanded by Jehovah to preach the judgments against the unfaithful the prophet Jeremiah

answered: "Then said I, Ah, Lord God! Behold, I cannot speak: for I am a child. But the Lord said unto me, Say not, I am a child: for thou shalt go to all that I shall send thee, and whatsoever I command thee thou shalt speak." (Jeremiah 1:6, 7) Jehovah declares that He ordained Jeremiah before he was born and sanctified him while yet in his mother's womb.—Jeremiah 1:7.

The psalmist David, who started out early in life as a fighter and minister of God and who as a child was anointed to succeed King Saul, said: "Out of the mouth of babes and sucklings hast thou ordained strength because of thine enemies; that thou mightest still the enemy and the avenger." (Psalm 8:2) Christ Jesus quoted from this scripture when He rebuked the religious scribes and Pharisees who complained about the children following His teachings. (Matthew 21:15, 16) When the disciples complained that children were too young to permit them to talk with and follow Christ Jesus the Master rebuked them and said: "Suffer little children to come unto me, and forbid them not: for of such is the kingdom of God."—Luke 18:16.[14]

When Jesus was only twelve years of age and preached as one of Jehovah's witnesses in the temple, He confounded the wise men and astonished them with His wisdom and answers. (Luke 2:46, 47) The favorite friend and companion of the apostle Paul was Timothy, ordained a minister long before he reached the age of maturity, taught and preached while yet a very small child, publicly and from house to house. (Acts 16:1-3) The capacity of Timothy to preach was questioned and Paul wrote to 'his son of faith' thus: "Let no man despise thy youth; but be thou an example of the believers, in word, in conversation [conduct], in charity, in spirit, in faith, in purity." —1 Timothy 4:12, bracketed word added.

The prophet Samuel when very young was conse-

[14] Matthew 18:2-7 where Jesus said: "But whoso shall offend one of these little ones which believe in me, it were better for him that a millstone were hanged about his neck, and that he were drowned in the depth of the sea."

crated to the service of the Lord and turned over to the priest Eli by his mother, Hannah, to perform temple service and act as a minister of Almighty God. (1 Samuel 1:24; 2:11, 28) Jehovah God declares: "Now therefore hearken unto me, O ye children: for blessed are they that keep my ways." (Proverbs 8:32) David counsels: "Both young men, and maidens; old men and children: Let them praise the name of Jehovah; for his name alone is excellent; his glory is above the earth and heaven."—Psalm 148:12, 13.[15]

It is apparent that there is no scriptural argument to support the contention that it is improper for a child of tender years to accompany its parent or guardian in preaching activity or worship. Such contention is plainly unscriptural. The popular opinion that children should not preach comes from the specious prevailing orthodox view that the clergy are the sole custodians of an understanding of the Bible and that an ability to teach it to others is esoteric.[16] Contributing also to this notion of error is the universal practice of parents delegating their non-transferrable duty of teaching the Bible to their children at home to so-called Sunday Schools from which they are never graduated.

Unnecessary it is to argue to this court any more that the activity of Jehovah's witnesses constitutes preaching of the gospel carrying the right to protection under the shield of the First Amendment securing freedom of religion. This court has so declared.[17]

If this activity is secured to Jehovah's witnesses who

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[15] See also 2 Kings 5:1-4; 2 Chronicles 24:1-4; 34:1-4.

[16] "God created man in His image and from that time hence man has been busy creating God in his image and prescribing dogmas and rituals by which God may be worshiped. The authors of the Federal Constitution knew how prone men are to impose their religious beliefs upon their brethren and to tolerate no other form of worshiping God except their own. Therefore, in their wisdom they wrote in the First Amendment, . . ." —Judge Sims, Ratliff and Tilford of the Court of Appeals of Kentucky specially concurring in *Steevers v. Somerset* (Ky.), a case involving Jehovah's witnesses, decided October 29, 1943.

[17] *Largent* v. *Texas*, 318 U.S. 418; *Murdock* v. *Pennsylvania*, 319 U.S. 105; *Jones* v. *Opelika*, 319 U.S. 103; *Cantwell* v. *Connecticut*, 310 U.S. 296.

are *adults* there is no reason why the bulwark of the Constitution does not protect also a *child* who is one of Jehovah's witnesses, following his parents.

One of the principal slogans of the United Nations during this total war is "freedom from want". Another is "freedom from fear". These are claimed as the heritages of the children now on earth and those yet to come. These heritages must be for all children, regardless of race, color or creed. The foundation of these birthrights is freedom of worship. Unless this freedom is granted to meet the needs of every conscience there cannot be a realization of freedom from want and freedom from fear. To deny, under guise of law, these privileges to a mother and her child, or guardian and ward, because of their way of worship, does not speak well of the ones entrusted with the people's government and liberties in this land. Such course does not contribute greatly to the war effort when the backbone of such is the *family* on the home front which is attempted to be broken up by the prosecution here.

The Supreme Judicial Court holds that the volunteer activity of the child constituted "work" within the meaning of section 81 of the Act; and that it was "selling, exposing or offering for sale" prohibited by section 69. These constructions are distortions of the facts and the record. The society did not employ the child to work. Roger Flint the company servant did not importune the girl to labor. The appellant did not urge or ask the child to go with her. The child asked to go with her because the child was one of Jehovah's witnesses. She desired to serve Almighty God. She was serving Jehovah God and not her guardian, not any man, not the society or any earthly institution. The girl desired to pay her vows unto her God. Since she was thus serving Jehovah it cannot be said that she was working for any creature on earth. No man or government has authority to punish a child or another creature because the child is permitted to serve Jehovah God. There is not one iota of evidence that there was employment or

that the girl was an employee as that term is ordinarily understood. There is not the faintest suggestion that the child was exploited commercially. There is no evidence of any profit or income to any of the parties involved in the transaction.

It may be argued that the conclusion on the facts by the court below is binding upon this court. When a substantial federal question is involved as to whether a right secured by the federal constitution has been denied it is the duty of this court to inquire into the evidence, especially when there is a mixed question of law and fact. In *Sterling* v. *Constantin,* 287 U. S. 378, this court said: "Accordingly, it has been decided in a great variety of circumstances that when questions of law and fact are so intermingled as to make it necessary, in order to pass upon the federal question, the court may, and should analyze the facts. Even when the case comes to this court from the state court this duty must be performed as a necessary incident to a decision upon the claim of denial of federal right." See also *Fiske* v. *Kansas,* 274 U. S. 380, 385, 386. A distortion of the record in the case of *Murdock* v. *Commonwealth,* 319 U. S. 105, was held not conclusive upon the court. There it was said: "On this record it plainly cannot be said that petitioners were engaged in a commercial rather than a religious venture. It is a distortion of the facts of record to describe their activities as the occupation of selling books and pamphlets." In the *Murdock* case the record showed that in some transactions where contributions were made there was a differential but this record wholly fails to show any such. On the contrary it shows that the donations were turned over in their entirety to the society for more magazines. As in the *Murdock* case the record shows that many pieces of literature were donated without contribution.

Freedom of worship as secured in the Constitution is not confined to the conventional modes of worship of recognized sects at the time of the adoption of the Constitution. This liberty is not confined to the orthodox

practices of this age. The guarantee is necessarily general so as to include all kinds of worship. While the liberty is immovable its boundaries are not static or confined to the popular religions of the time. The guarantee was intended to endure for ages to come and to be adapted to the various crises of human affairs and vicissitudes of life of a mixed race of people of all kindreds, nations and tongues. The founding fathers knew that to confine the guarantee to such narrow limits would not be appropriate and conducive to the ends aimed for, namely, "blessings of liberty" for posterity. No democratic constitution can contain an accurate detail of all the beliefs and practices of the hundreds, if not thousands, of religious denominations permitted to flourish under its flag. To attempt such would require a very prolix document and be most unwise and pernicious, because it would be an attempt to provide an immutable rule for changes which, if foreseen at all, must as to the distant future be seen dimly and would deprive posterity of the capacity to avail itself of experience or to exercise its choice of change from religion to Christianity, etc.

For purposes of decision of this case it must be conceded that the Christian activity of Betty Simmons, while in the custody of appellant, was just as necessary and appropriate to her spiritual welfare as is the approved practice in the recognized faiths of taking a child to mass, to *Sunday School,* to hear a sermon or permitting a child to sing in a church choir or act as altar boy. The only distinction that can be drawn between the rights to engage in the various activities is the *forum.* The distinction as to the forum is a distinction without a difference and not material. For purposes of determining the constitutionality of the application of the statute there is no difference or distinction.

The judicial branch of the government rather than the legislative authority must decide when freedom of worship and freedom of maintaining a family must yield to the police power, and in performing this task this court must

make a deeper inquiry than when property rights are involved. "Mere legislative preferences for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations." Murphy, *J.*, *Thornhill* v. *Alabama,* 310 U. S. 88.

In *Schneider* v. *State,* 308 U. S. 147, it is said: "And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights." The performance of this task cannot be presumed to have been undertaken by the legislature in the passage of the acts or laws which they pronounce. So long as legislators and those who apply and enforce the laws are perfect, are free from factional interests, are magnanimous and virtuous and without outside influence it may be presumed, that the circumstances warrant finding of constitutionality. But the plan of this government for an independent judiciary assumed that the legislators and enforcers of the law would not be so Utopian and contrary to uniform experience. Therefore the courts were created to weigh and decide conflicts between governor and governed on the theory that men and legislators and police will be as they are, imperfect, and not as they would be if they were perfect, free from vice and error.

If the application of the law here be sustained then it is readily apparent that the state could next step into the orthodox churches and make decrees by legislative fiat prohibiting boys and girls below a fixed age from singing in choirs, denying parents the privilege of their children acting as altar boys, and performing many other acts of

religious ceremonies. The right of the parents to direct their children in these and other activities are inherently protected by the Constitution against encroachment by child labor laws or delinquency laws.

The power of the State to require compulsory attendance at school and to direct the course of education of children in the public schools is not unlimited. This authority must yield to the prerogative of the parent to direct the education of the children in matters pertaining to the Bible and the faith or religion of such individuals. The right of the parent or guardian is held to be stronger and more vital in these sacred matters than the right of the state. [18]

The more vital state right to instill into the mind of the children patriotism has been held by this court to be subordinate to the conscientious objections of the child to participation in flag-salute ceremonies and giving the pledge of allegiance. This court declared invalid regulations providing for expulsion of children for refusal to participate in such ceremonies. [19]

If the educational policy of the State must yield to the consciences of the children and parents, then with equal force of reason it must be said that the police power of the state to enforce restrictive legislation designed to curb child labor cannot be applied, and when applied must yield to the right of the parent to direct the child to engage in practices, service and worship voluntarily rendered by the child and considered necessary in the discharge of its covenant obligations to Jehovah God. This conclusion is supported by the Supreme Court of New Hampshire in *State* v. *Richardson*, — N. H. — 27 A. 2d 94, involving the child labor statute of New Hampshire which is very similar

[18] *People* v. *Stanley*, 81 Colo. 276, 282, 265 P. 610; *State* v. *Weedman*, 55 S. Dak. 343, 226 N. W. 348; *Spiller* v. *Woburn*, 12 Allen (Mass.) 127; *State* v. *Schieve*, 91 N. W. 846; *Weiss* v. *School District*, 76 Wisc. 177; *People* v. *Board of Education*, 245 Ill. 334, 92 N. E. 251; *Herold* v. *Parish Board*, 136 La. 1034, 68 S. 16; *Hardwicke* v. *Board of School Trustees*, 54 Cal. A. 696, 205 P. 49.

[19] *West Virginia State Board of Education* v. *Barnette*, 319 U. S. —, 63 S. Ct. 1178.

to that of Massachusetts. That court held the statute to be inapplicable to the activity of the identical type under consideration in this case.

The holding of the court below is in conflict with *Pierce v. Society of Sisters*, 268 U. S. 510, which in principle sustains the contention of appellant here. In that case the Oregon compulsory education law making compulsory attendance of all children of a certain age at public schools was declared to be unconstitutional. In that case the court said: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." There are other opinions and statements by this court which lead to the conclusion above expressed.[20]

There are many cases which hold that the teaching of a child that the Bible forbids the salute to a flag which results in the child's expulsion from school does not warrant proceedings to have the child declared a dependent or delinquent child or justify prosecution of the parent for allegedly contributing to the dependency or delinquency of the child because of its being denied the right to attend school.[21]

By analogy the conclusion should be reached here that the appellant cannot be convicted under the statute because of her connection with the child's activity.

In the field of domestic relations where the courts are vested with broader discretion in respect to awarding

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[20] See *Meyer* v. *Nebraska*, 262 U. S. 390; *Berea College* v. *Kentucky*, 211 U. S. 45 at page 67; *Allgeyer* v. *Louisiana*, 165 U. S. 578 at page 589.

[21] *In re Lefebvre*, 91 N. H. 382, 20 A. 2d 185; *In re Latrecchia*, 128 N. J. L. 472, 26 A. 2d 881; *People* v. *Sandstrom*, 279 N. Y. 523. 18 N. E. 2d 840; *People* v. *Chiafreddo*, 381 Ill. 214, 44 N. E. 2d 888; *Commonwealth* v. *Johnson*, 308 Mass. 370; 35 N. E. 2d 801; *State* v. *Smith*, 155 Kans. 588, 127 P. 2d 518; *Bolling* v. *Superior Court for Clallam County, Wash.*, 133 P. 2d 803; *In re Jones*, 175 Misc. 451, 24 N. Y. S. 2d 10; *In re Reed*, 262 A. D. 814, 28 N. Y. S. 2d 92; *South Dakota* v. *Davis*, —S. D.—, 10 N. W. 2d 288, decided July 3, 1943; *Pendley* v. *State*, —Okla. Cr.—, 141 P. 2d 118, decided Sept. 1, 1943.

custody of children to either spouse it has been held to be an abuse of discretion to deny one of Jehovah's witnesses the custody of his child because the child has been taught to preach publicly and from house to house as one of Jehovah's witnesses. *Stone* v. *Stone*, — Wash. —, 133 P. 2d 526."[22]

The claimed and presumed injuries to the child from participation in the activity are too trivial and slight and do not justify the action taken by the state against the appellant under the police power expressed in the statute misapplied here. The benefits that flow from the exercise of the freedom to raise a family, direct the spiritual education of the children, freedom of worship by preaching in the manner the child did, outweigh the claimed interest of the state to such an extent as to exclude the encroachment by the state upon appellant's inherent right. Hence the conviction cannot be sustained.

There is no care so good and helpful as the care that devoted parents can give the child. The cold, disinterested arm of the State can never substitute for the warm embrace of a loving father, mother, aunt or guardian. Legislative fiats and regimented instruction of paid instructors at state schools for delinquents cannot substitute for the nurture and admonition of a Christian relative that build the child's security to begin a well-balanced, normal, adult life. This is true regardless of how misguided others may think that appellant is in the spiritual education of the child and the practice of preaching according to the dictates of her conscience.

The conclusion is compulsory that the construction and application given the statute by the courts below makes it unconstitutional because abridging the fundamental rights of appellant and the child to worship Almighty God. The

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[22] See also *Reynolds* v. *Rayborn*, 116 S. W. 2d 836, where it was held that teaching the child that God's law forbids the salute to any flag held to be no grounds for denying the custody of the child to its father, one of Jehovah's witnesses.

statute must be declared to be in fatal collision with the First and Fourteenth Amendments.

THREE

As construed and applied the statute is unconstitutional because it abridges and denies appellant's and the child's privileges, rights and immunities secured by the Constitution in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

It is not contended that the statute is void on its face because of discrimination. Only insofar as the statute has been *construed and applied* to cover the worship and freedom of conscience secured by the Constitution *does the statute violate the equal protection clause.* The reason for this claim is that the courts below have arbitrarily discriminated against children under the age of eighteen years of age and parents having children under that age so as to prohibit such to enjoy their freedom of worship secured by the First Amendment. The statute, as construed, also discriminates against Jehovah's witnesses and their children and persons of various orthodox faiths in the matter of education of the children in the Bible and directing the religious practice of children. The classification is arbitrary and made without substantial basis in law. Thus it violates the Constitution.[23]

The classification here is not upon any ground of difference having a fair and substantial relation to the police powers of the commonwealth; therefore all persons in the same class cannot be treated alike.[24]

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[23] *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 417; *Ward* v. *Maryland*, 79 U. S. 418, 12 Wall. 418; *Yick Wo* v. *Hopkins*, 118 U. S. 358.

[24] See also *Power Mfg. Co.* v. *Saunders*, 274 U. S. 490; *Truax* v. *Corrigan*, 257 U. S. 312, 331-333, 337-339; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389; *Ex parte Ernest*, 138 Tex. Cr. R. 441, 136 S. W. 2d 595; *City of Rockland* v. *Hey*, 336 Ill. 526, 9 N. E. 2d 317; *Ward Baking Co.* v. *City of Fernandina*, 29 F. 2d 789. Cf. Freund, *The Police Power*, pp. 133, 497.

Appellant and the child have been denied their right of freedom of worship of Almighty God contrary to the *equal protection* clause of the Fourteenth Amendment because of the discrimination.

Conclusion

Notwithstanding the tendency on the part of the court below to minimize the issues presented in this case, the real issues to be reached and decided are of the greatest importance and far-reaching magnitude for every American. This is a contest precipitated by the Commonwealth directly challenging the sovereignty of the people. A factitious 'presumption of validity' has been thrown up by the Commonwealth to ward off the constitutional attack made by appellant, but it is here submitted that this defense cannot be used as a subterfuge for the sabotage of freedom, which is in truth and in fact its ultimate operation.

No freedom possessed and secured by the sovereign people is cherished like that of freedom to enjoy a family relationship and to worship God according to the dictates of conscience. The high regard for this freedom is born of bitter experiences endured by the ancestors of the present generation, at the hand of tyrants large and small in every corner of the globe. These tyrants, as the pages of history show, did not hesitate to dictate the most personal relationships of the family unit, and to jail those dissenting from their tyranny. In the absence of any positive showing that the actions of the appellant and her young charge constituted a threat to the public health or morals, the thing sought to be sustained here is not a whit better than the bloody tyranny of the dark ages.

Because the courts below erred in their judgment overruling appellant's motions and requests, all of which were based on the Constitution; because the judgment plainly and wrongfully infringes upon the most cherished right of the sovereign people of the United States; because the

judgment outrages the very thing the sovereign is now fighting to protect—the judgment ought to be reversed, and the appellant discharged, with costs.

Respectfully submitted,

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